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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 80

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, AND THE HONORABLE ANDREW D. CHRISTIE, Sitting as a Judge of That Court; and CITIES SERVICE GAS COMPANY, *Respondents*.

On Writ of Certiorari to the Supreme Court of the State of Delaware

REPLY BY PETITIONER PAN AMERICAN PETROLEUM CORPORATION TO "BRIEF FOR RESPONDENT CITIES SERVICE GAS COMPANY"

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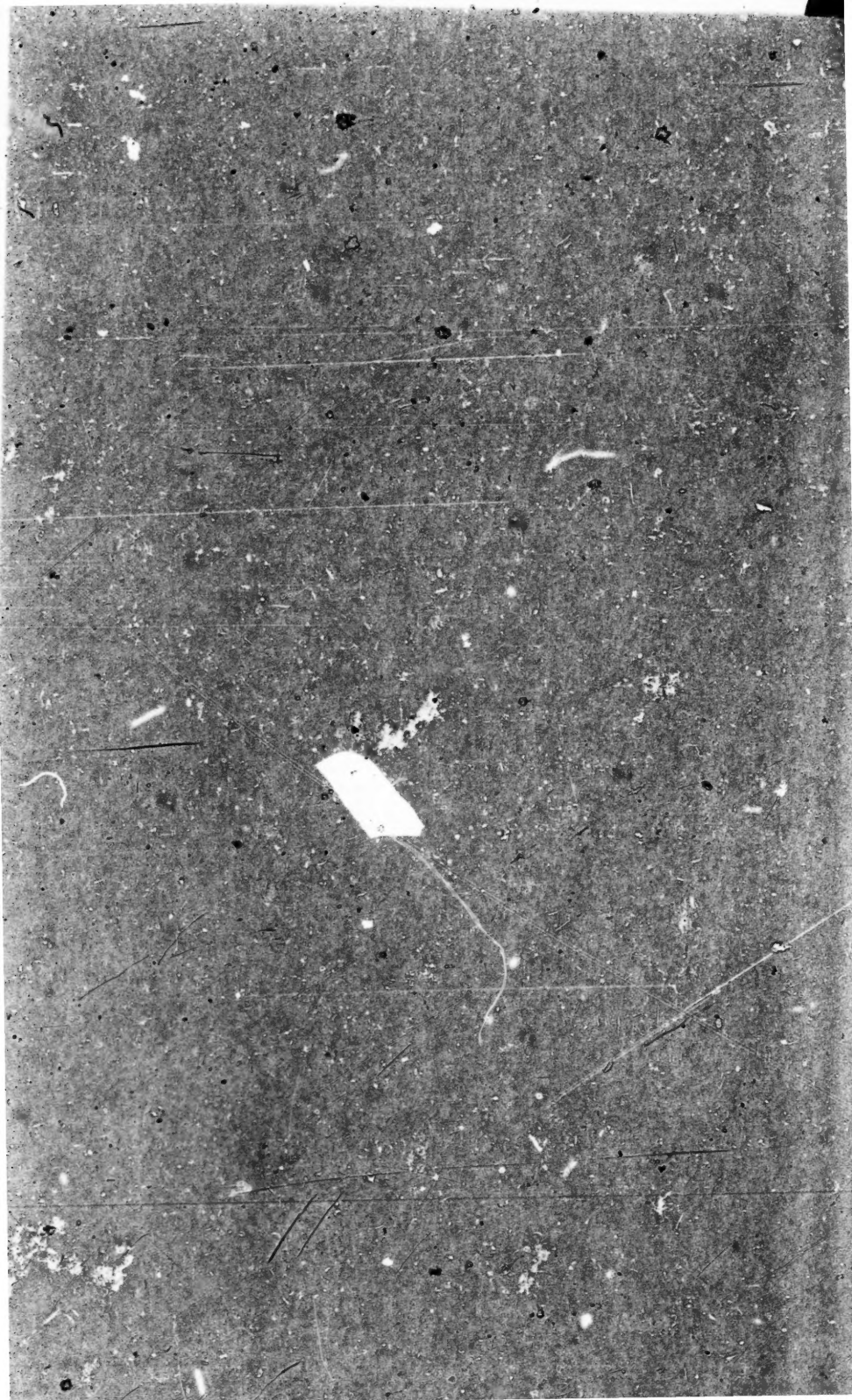

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Petitioner hereby replies to the Brief for Cities Service Gas Company (Cities).[1]

INTRODUCTORY STATEMENT

Cities advances two basic contentions to support state court jurisdiction, (1) that jurisdiction is to be determined solely from allegations in the complaint; and (2) that Cities

[1] Petitioner is submitting a separate reply to Briefs Amici Curiae appended to Motions for Leave to file Briefs by Colorado Interstate Gas Company and the municipalities of Atchison, Kansas, *et al.*

has a common law cause of action based on contract concurrent with a statutory cause of action based on the filed rate. Cities contends that if it chooses to frame its action in contract; despite the fact that its amended complaint discloses the nature of the regulated sale, the state court has and retains jurisdiction. Petitioner submits Section 22 may not be so circumvented, and that the effect of Sections 4 and 19, in controlling rights and liabilities, may not be so destroyed. Cities' theories are directly contrary to the Act, Regulations, and federal decisions since the Commission began exercising its jurisdiction over producers' rates.

Implications that these questions involve "flouting" consumer protection are also misplaced (*Cf.* Cities Br., pp. 57-58). The Act, of course, exists to assure "reasonable" rates, but also establishes exclusive fora and vests protective powers in the Commission. Cities' customers thus proceed within the framework of the Act and do not sue Cities in state courts. The same rule must apply to the rate relationship between Cities and Petitioner. The basic question is jurisdiction over the filed rate—the only means whereby the Commission controls the rate level in cents-per-Mcf and thus exercises the function of consumer protection.

I. SUBJECT MATTER, NOT FORM ALONE, DETERMINES JURISDICTION.

As stated, Cities brought its action to enforce an alleged price for the sale of natural gas, omitting to disclose that throughout most of the period covered by its action, the rate covering the transaction was on file with the Commission. It now asserts that jurisdiction of the state court must be determined *solely* from the form of its complaint although the complaint, as amended, and subsequently admitted facts show the state court to be without jurisdiction of the subject matter—a strong doctrine, if correct.

It was early disclosed in the trial court that the subject matter was the rate for gas sold in interstate commerce for

resale, and, as such, fell within the purview of the Act. It was also recognized that the only rate which could be enforced in any court was the filed rate. The Superior Court stated:

> "In the course of the briefing of the motion for summary judgment, *both parties agreed* that as to the period after July 16, 1954, at least *no rate may be asserted as a legal right that is other than the filed rate.*
>
> "Thus, it became apparent that a major issue in this case is the determination of what rate was the 'filed rate' with the FPC during the period in question. (R. 12) (Emphasis supplied.)
>
> . . . . . .
>
> "Both parties agree that as to the period after July 16, 1954, the only legal rate is the filed rate 'and not even a court can authorize commerce in a commodity on other terms.' *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). The question then becomes what rate was legally filed? Plaintiff claims that the rate filed was the contract rate, . . .". (R. 18) (Emphasis supplied.)

The Delaware Supreme Court, in spite of this recognition by the trial court that the only enforceable legal right is the right to the filed rate, stated:

> "The trial court held that the actions were suits founded on the contract to refund excessive payments, and not on the Natural Gas Act. *Agreeing with the defendants that the only legal rate is the filed rate*, it held that the contract action could be maintained if it is not inconsistent with federal law or regulation." (R. 38) (Emphasis supplied.)

Under Rule 15(b) of the Rules of the Superior Court (Civil) of the State of Delaware, as under the Federal rule of the same number, issues tried with consent of the parties are treated in all respects as if initially raised in the pleadings of the party seeking to recover under the right thus injected as an issue.

In the trial court, Cities made numerous statements to the effect that it was relying upon a filed rate rather than a "contract price." For example, it stated:

> "Suffices it to say here, that *defendant's rate schedule fixed the price at 8.4* cents and no more." (R. 765) (Emphasis supplied.)
>
> . . . . . .
>
> "*The law permits no deviation from defendant's filed rate of 8.4¢ per Mcf.*" (R. 767).

This is how both state courts and Cities characterized the action. Clearly, if "the law permits no deviation from defendant's rate schedule," then the action must be one to enforce the filed rate.

This Court thus may consider Cities' inconsistent moves to maintain its action in the state court against any attack. First it omits from its original complaint a controlling jurisdictional fact. Had this been properly disclosed, state court jurisdiction would have been subject to immediate attack. When the true nature of the subject matter, and that the rates of 14¢ and 11.0715¢ had been filed by the Commission were disclosed, Cities recognized that it could not recover on anything other than a filed rate. It met this threat by asserting that while the filed rate controls, the price it is suing for, *i.e.*, 8.4¢, *is* the filed rate. It asserted that it had "shown that defendant's filed rate schedule fixes the price for this gas at the contract rate, 8.4¢. . . . The rate fixed by defendant's rate schedule is binding upon plaintiff and defendant and upon this court with the force and effect of federal statute." (R. 767).

Having confirmed the true nature of the subject matter of its action to avoid immediate defeat, Cities then was met with the attack upon the jurisdiction of the state court. Now it returns to the "form" of its complaint. Jurisdiction must be tested solely, it asserts, from the form of that complaint. Can such tactics succeed? The very cases Cities cites to support its contention say that they cannot.

For example, Cities cites *The Fair* v. *Kohler Die & S. Co.*, 228 U.S. 22 (1913), as supporting its statements that the plaintiff is "master" of his lawsuit. There the petition, filed in the federal court, alleged a violation of patent laws; the answer asserted that there was no question arising under the patent laws. While this Court sustained jurisdiction of the federal court under the patent laws, far from holding that a plaintiff can conceal the true nature of his cause of action and in this manner sustain a jurisdiction which does not exist, this Court stated (228 U.S. at 25):

> "No doubt *if it should appear* that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. *In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court . . .*". (Emphasis supplied.)

Odell v. *Farnsworth Co.*, 250 U.S. 501 (1919), is also cited by Cities. There the complaint was in federal court as an action for royalties on the theory that the patent laws sustained federal jurisdiction. This Court, holding the action to be on a contract for royalties and not for infringement, sustained a dismissal for lack of jurisdiction.

To sustain its contention that the "single test of jurisdiction is the allegations of the complaint," Cities also cites *Henry* v. *A. B. Dick Co.*, 224 U.S. 1 (1912). Again the action involved a suit brought originally in federal court for an alleged infringement by a licensee under the patent laws. The law permitted two types of actions to be brought, one for breach of contract against the licensee or one for patent infringement. The plaintiff chose to bring its action for infringement. All that this Court held was that *having a* choice, the plaintiff had a right to determine which cause of action he would pursue, and jurisdiction of the federal court was upheld.

Similarly, *Taylor* v. *Anderson*, 234 U.S. 74 (1914), is cited by Cities, but that case merely held that the petition failed to disclose federal court jurisdiction. *First National Bank* v. *Williams*, 252 U.S. 504 (1920), is cited by Cities, but the case was brought originally in federal court, and this Court simply stated that a petition must disclose on its face, "that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress," and the petition failed to make such disclosure. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950), is cited by Cities, but was brought originally in the federal court, and involved the same doctrine that a petition must disclose some grounds for federal jurisdiction.

Cities' argument thus assumes that the requirements of invoking jurisdiction of a court and of maintaining jurisdiction are the same. This is akin to a notion that the requirement of a ticket for admission to an arena having been met, ejection is forbidden after it develops that the ticket is counterfeit. *Cf. Lambert Run Coal Co.* v. *B. & O. R. Co.*, 258 U.S. 377; (1922); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955).

Cities also cites various cases to support its contention that state courts are not ousted from jurisdiction when federal questions are "injected defensively," but these do not apply. *Gully* v. *First National Bank*, 299 U.S. 109 (1936), is contrary to Cities' contention. The action there was brought originally in the state court, and this Court, upholding state jurisdiction, stated (299 U.S. at 115):

> "*Not every question of federal law emerging in a suit* is proof that a federal law is the basis of the suit." (Emphasis supplied.)

The clear inference is that when the question of federal law which *is* the basis for the suit *does emerge*, then exclusive federal jurisdiction if any, must attach.

There is a vast difference between an answer which simply interposes some federal law or regulation as a "defense," as in the *Gully* case, and an amended complaint, answer and subsequent proceedings, as here, which disclose that the *basis* of the cause of action is a federal statute under which federal courts are given "exclusive" jurisdiction. Failure to recognize this distinction is Cities' basic error.

Cities also makes obscure references to *Montana-Dakota Utilities Co.* v. *Northwestern Public Serv. Co.*, 341 U.S. 246 (1951). There, the complaint alleged a cause under 28 USC §§ 1331 and 1337, and the cause of action, if one could be stated, arose under federal statutes and was cognizable in a federal court. This Court did not there hold that a party can give a court jurisdiction of the subject matter where, as here, a specific statute has removed the subject matter from the court's jurisdiction. The Court stated (341 U.S. at 249):

> "As frequently happens *where jurisdiction depends on subject matter*, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." (Emphasis supplied.)

Here jurisdiction *depends on subject matter*. As soon as it developed that the subject matter was a federally regulated rate, lack of jurisdiction in the state court was evident. The state court should have dismissed the action for want of jurisdiction.

In *Montana-Dakota*, this Court recognized that were the complaint to be treated as a common law action, rather than a statutory action as alleged in the complaint, then, in spite of allegations in the complaint, the federal court would have been without jurisdiction of the subject matter. The Court then held that the subject matter was a rate filed with the Commission, and that accordingly, the federal court had jurisdiction, although collateral attack was forbidden.

A plaintiff may not disguise its true cause of action and by so doing bestow jurisdiction upon a court which otherwise would lack jurisdiction. The proposition was thus stated at 14 Am. Jur. 385 § 191:

> "*Where judicial tribunals have no jurisdiction of the subject matter on which they assume to act, their proceedings are absolutely void* in the strictest sense of the term; and a court which is competent to decide on its own jurisdiction in a given case *may determine that question at any time in the proceedings of the cause, whenever that fact is made to appear to its satisfaction*, either before or after judgment. Accordingly, an objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceedings; in fact, it may be raised for the first time on appeal. *A court will recognize want of jurisdiction over the subject matter even if no objection is made.* Therefore, *whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise*, it is the duty of the court to consider it, for if the court is without jurisdiction, it is powerless to act in the case." (Emphasis supplied.)

A succinct statement of the principle appears in *Corbley v. Dooley*, 313 Ill. App. 509, 40 N.E. 2d 581, 584 (1942):

> "Jurisdiction of the subject matter is conferred by law and does not rest solely upon the averments in a pleading."

This Court has given a negative reply to Cities' contention in *American Express Co. v. South Dakota*, 244 U.S. 617 (1917). The Interstate Commerce Commission had ordered the express company to publish certain intrastate express rates in South Dakota for the purpose of removing discrimination against interstate commerce. The express company, purporting to act pursuant to this order, published a complete new structure of intrastate express rates, including rates from the five principal jobbing cities to all points in South Dakota. The State brought an orig-

inal action in the state supreme court seeking to enjoin operation of this statewide change in express rates. No mention was made in the complaint of the order of the Interstate Commerce Commission. The express company by answer set out the agency's order and attacked the jurisdiction of the state court on the grounds that the action was tantamount to an attempt to set aside the agency order, cognizable only in a federal court. While upholding the jurisdiction of the state court in part, this Court made clear that jurisdiction of the subject matter does not hinge solely upon allegations in the complaint (244 U.S. at 628):

> "The bill does not purport to attack, nor does it even refer to, any such order. . . . Whether or not the state court has jurisdiction cannot, of course, depend upon the professed purpose of the proceeding nor upon the mere form of pleading. . . . The answer does not allege that *all* the intrastate rates to and from the five cities which have been advanced were advanced in compliance with the order of the Commission . . . it is clear that the special tariffs here in question include advances of rates between the five cities and many 'points' in the state to which the Commission's order did not apply. . . . These rates the Supreme Court of South Dakota had jurisdiction to enjoin and the decree must be affirmed to that extent."

As to the rates covered by the federal agency order, the state court lacked jurisdiction, and this Court reversed the decree of the state court.

To say that a plaintiff has power to control his cause of action assumes he has a choice. But where he has no choice, he cannot create one artificially, as Cities attempts. Cities assumes that it has a choice between state court and federal court jurisdiction, whereas, in fact, Cities has none. Where the admitted facts ultimately before the court disclose that Cities had no choice, that the only cause of action Cities had, if it had any, was based upon rates required to be filed with the Commission and cognizable only in a federal court, then the state court was without jurisdiction

Dismissal for lack of jurisdiction then would deprive plaintiff of no "right" to "control" his lawsuit, for he had no right to be in the state court in the first place.

The subject matter of this action admittedly is the federally regulated rate. Cities' argument overlooks the fact that as to matters within the ambit of the "interstate and foreign commerce" clause of the Constitution, Congress has power to limit jurisdiction of actions to federal courts and thus pre-empt state courts. Here, it has, and Congress' determination to so pre-empt state courts is not defeated by the form of a complaint. The subject matter determines the jurisdictional limitation, and here the subject matter—the rate regulated under the Act—is beyond the reach of state courts.

II. CONCURRENT COMMON LAW AND STATUTORY JURISDICTION WOULD DESTROY FEDERAL CONTROL UNDER SECTIONS 4, 19 AND 22.

A. The Natural Gas Act completely pre-empts state control or enforcement of the rate.

Cities contends that the Act leaves parties the "right" to enter into contracts and then enforce such "contracts" in common law actions entirely separate and apart from statutory requirements of the Act. It asserts that state court jurisdiction over common law rights is not defeated even though a cause of action "could" have been brought for "violation" of a federal statutory right. As applied here, this is no more than to contend that state and federal courts have concurrent jurisdiction to enforce the rate—federal courts by virtue of the Act; state courts by virtue of contract.

To sustain this proposition, Cities cites various cases where there is no conflict between contract "rights" and rights created by federal statutes. Some of these cases deal with 28 USC §1338(a) where the statute creates federal court jurisdiction of actions for patent or copyright

infringement, and where there is no inconsistency between an action to enforce a contract and an action for infringement. For example, in *Henry* v. *A. B. Dick Co., supra*, the plaintiff chose to bring its action for infringement even though it had a cause of action for breach of contract by its licensee. Actually there is no concurrent jurisdiction, in the true sense, in these patent and copyright cases; there simply are two different causes of action. The federal statute does not purport to take away the contract rights; it purports only to limit actions for infringement to federal court jurisdiction.

Montana-Dakota makes clear that in statutes such as the Natural Gas Act there can be only one cause of action arising out of the subject matter, and that cause of action must be upon the filed rate. Even Cities recognized as did the court below, that the only enforceable rate is the filed rate, and this being true, there can be no cause of action arising out of a contract as such. As stated in *Montana-Dakota*, the only legal rate is the filed rate "whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." This should end all argument that there can be "concurrent" causes of action, one on contract and one on the right arising under the Act by virtue of a rate. (See also *Texas & Pacific* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).)

The fallacy of Cities' contention is from reading decisions under the Natural Gas Act as holding that a "contract price" is effective and enforceable even if it is not filed with the Commission. This Court has never so held. While the Act does not purport to take away the right to contract originally as to price, this is not an uncontrolled right but is subject to the jurisdiction of the Commission to accept or reject the rate. No rate can become effective and enforceable except by being filed by the Commission under Section 4. It is obvious that the supervision and control

of the rate intended by Congress would be defeated were Cities' contention accepted.

Cities, although now saying that its action is based exclusively upon contracts, express and implied, nevertheless admits that for a court to determine the issues it must determine what rate was in effect under the Act. Cities thus states (Cities Br., p. 56):

> "... it is Cities claim that the contract rate and the legally effective rate contained in the filed rate schedules are one and the same, *and for this reason* Petitioners' defenses are without merit." (Emphasis supplied.)

The converse is that if a "contract price" and the legally effective rate are not one and the same, Petitioner's "defenses" are valid. (*Cf.* Pet. Main Br., p. 51, fn. 22.)

Cities also recognizes that the state court can in no event grant Cities relief without determining what rate was on file with the Commission (Cities Br., p. 56):

> "Obviously, in order to pass upon Petitioners' defense that the filed rate is 11¢, the state court of Delaware will have to interpret the rate schedule with reference to the pertinent federal law."

The question necessarily arises as to why, if a cause of action can be based upon contract, is a state court required to look at a filed schedule?

Cities' brief makes it perfectly clear that whatever the form of a complaint, its cause of action, if it had any, is based upon a rate allegedly on file under the Act. While Cities avers that its cause of action is based upon contract, it also avers that it cannot recover if its contract price is not the same as the rate on file with the Commission. It also asserts that its claim is that the contract price and "the legally effective rate contained in the filed rate schedules are one and the same, and *for this reason* Petitioners' defenses are without merit." All Cities' argument thus comes to is that it is basing its right to recover on a rate

on file with the Commission, and alleging that that rate is 8.4¢. When this is understood, it becomes clear that Cities' action is actually one to enforce what it claims is the filed rate. Section 22 specifically excludes state court jurisdiction of such causes of action.

Considering that both state courts and Cities concede that the filed rate must control; that no other rate can be enforced; that a contract price must yield if differing from the filed rate, is it not then clear that the Act has eliminated a common law rate action, and that the basis of Cities' cause of action, if it had one, is a filed rate? And this being true, then is it not clear that the substantial question is whether Section 22 permits "concurrent" state court jurisdiction to enforce rates required to be filed with the Commission? That section speaks for itself; it clearly restricts jurisdiction to federal courts.

B. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956), did not imply a concurrent state-federal jurisdiction.

Under Cities' theory (Cities' Br., pp. 27-33), regulated companies, customers, and the agency could only ponder as to which rates are accorded statutory finality under the Act, and which rates are still controlled by "common law" theory, enforceable or subject to change in courts of general jurisdiction in future years. Choice would be left solely to any private person, and "finality" wholly subject to vagaries of state courts unfamiliar with detailed provisions of the federal statute, regulations, and vast body of applicable precedent.

Cities relies heavily upon *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (Cities Br., pp. 29-33). That case cannot be read as saying that powers of natural-gas companies to contract mean a concurrent state jurisdiction after a rate is filed. The federal courts recognize that *Mobile* also made clear that once a rate—"contract" or "ex-parte"—enters the filing process of

Section 4. Commission action fixes the effective rate in cents-per-Mcf to be charged thereafter, and thus creates and controls subsequent rights and liabilities with respect to that rate at all points in time. (See Pet. Main Br., pp. 27-31, 38-47.)

Every case cited by Cities involving interpretation of a schedule and what should be the effective rate under the Act, thus began before the Commission and proceeded into the courts under Section 19(b).[3] The federal courts' reasoning is that while the Act did not abrogate power to contract, the Act nevertheless imposes (a) requirements of filing rates; (b) primary jurisdiction of the Commission under Section 4, and its duty to decide whether to accept or reject a tendered rate; and (c) exclusive means for timely review and modification of any Commission action.

Texas Gas Transmission Corp. v. *Shell Oil Co.*, 363 U.S. 263 (1960), is illustrative. The seller believed the rate effective on June 7, 1954, was 12.5 cents, while the buyer claimed 8.997 cents should be the effective rate. (See *Shell Oil Co.* v. *FPC*, 263 F. 2d 223, 225 (3rd Cir. 1959).) The seller tendered the rate of 12.5 cents for filing under Section 4. Unlike its action upon Petitioner's tender of the 11 cents rate, the Commission then "neither accepted nor rejected the submitted rate," but requested "further ex-

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[3] This includes *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division, et al.*, 358 U.S. 103 (1958); *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960); *Natural Gas Pipe Line Co. of America* v. *Federal Power Commission*, 253 F.2d 3 (3rd Cir. 1958); *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir. 1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955); *Phillips Petroleum Co.* v. *Federal Power Commission*, 251 F.2d 906 (10th Cir. 1958); *Tyler Gas Service Co.* v. *Federal Power Commission*, 247 F.2d 590 (D.C. Cir. 1957); *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F.2d 90 (D.C. Cir. 1957); *Kerr-McGee Oil Industries, Inc.* v. *Federal Power Commission*, 260 F.2d 602 (10th Cir. 1958). (Cities Br., pp. 30, 32, 33, 36, 39, 49, 52, 58).

planation" as to conflicting contentions of buyer and seller. Thereafter, the Commission decided against the seller. In timely manner under Section 19(b), the seller obtained reversal by the Court of Appeals. On writ of certiorari, this Court reviewed questions of appellate jurisdiction and the substantive dispute, and remanded for further consideration of pertinent documents.

That dispute thus was and is being litigated exclusively through procedures of the Act. At no time did the agency or courts imply, as Cities urges, that buyer or seller could have litigated their dispute in a collateral action in a court of "original jurisdiction." Because buyer and seller correctly concluded that Commission action under Section 4 as to "acceptance" of the tendered rate of 12.5 cents was the action that forever after would control their rights, both proceeded in timely manner under the Act. (See also *Sun Oil Co.* v. *Federal Power Commission*, 364 U.S. 170 (1960).)[*]

Here, *Mobile* is relied upon for a proposition that a state court may independently fix past, present, or future rights and liabilities, and that judgment by a state court, either upon "common law" theories or after re-examination of the 1954-1961 effective rate in cents-per-Mcf, may control and "enforce" the rate. If Cities' theory were correct, it would not have been necessary in the *Mobile* case for the purchaser to protest and then proceed under Section 19(b). The purchaser could have ignored the Act, permitted the tendered rate to go into effect as the filed rate, but subsequently have brought a common law action in a state court

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[*] *Cf. Natural Ga. Pipe Line Company* v. *Harrington*, 246 F. 2d 915 (5th Cir. 1957), at pages 33 and 54 of Cities' brief, which related solely to a period when no rate was on file under the Act. "Restitution" was sought for deliveries "between September 10, 1952" and "July 1, 1954" (246 F. 2d at 918). Questions of statutory finality at issue were not decided, nor did the producer test jurisdictional bars and conditions precedent to recovery sought.

based on a contract price. Obviously this was not possible, and Cities is wrong.[5]

Cities also argues that *Great Northern Railway Co.* v. *Merchant's Elevator Co.*, 259 U.S. 285 (1922), applies, but is incorrect. Section 22 provides for "exclusive" enforcement jurisdiction, unlike provisions of the Interstate Commerce Act involved in *Great Northern*. That case has never been authority for by-passing a regulatory statute in an effort to change a fixed rate relationship through "judgment," without recourse to the agency. As noted in *United States* v. *Western Pacific R. R. Co.*, 352 U.S. 59, 69 (1956), the "distinctions laid down" in *Great Northern* "call for decision based on the particular facts of each case."

Here, such distinctions are laid down by statute. Section 22, on its face, precludes Cities' construction, and *Mobile* does not imply that "concurrent" jurisdiction is possible.

C. Correct construction of Section 22 could not result in "overburdening" federal courts.

Cities argues that adherence to the exclusive prescription of Section 22 would result in a "mountainous burden of federal court litigation" (Cities Br., p. 24). To the contrary, Cities' theories would.

Until the Delaware courts' decisions, regulated companies looked only to the public records and acts under Sec-

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[5] Cities also refers to petition for declaratory judgment by Petitioner in a Kansas state court, after Cities' initial demands based on common law. (See *Pan American Petroleum Corp.* v. *Cities Service Gas Co.*, 182 F. Supp. 439 (D. Kan. 1958), and Cities Br., pp. 26-27.) That action was for declaratory judgment to determine whether price specified by contract had been amended under state law by conduct of the parties. It was *not* an action for coercive relief, for determination of filed rate under the Act, or enforcement of either a "contract price" or filed rate. That proceeding is stayed pending determination of this case.

tion 4 as fixing the rates in cents-per-Mcf and controlling all rights and liabilities. Under Section 4, the Commission has always controlled the rate level through Regulations, action upon a rate at the time of tender, and letter orders. The applicable and exact rate in cents-per-Mcf effective at any point in time was determined solely by reference to these public records (*i.e.*, R. 636-646, 651-655). Subject only to timely review under Section 19, finality was accorded this exact rate level, and bills were rendered and paid only at the cents-per-Mcf rate accepted for filing and made effective by the Commission.

As a result of this finality from Commission actions accepting tendered rates under Section 4 and exclusive review under Section 19, there has been little litigation under Section 22. Prior to Cities' attacks, there appear to have been only two reported cases involving Section 22 in the Act's twenty-year history. (See Pet. Main Br., p. 25). Cities' theories not only undermine this finality by attack in state courts, but would flood the federal courts with litigation founded upon diversity (*e.g.*, see references at pages 3 and 38 of the Motion and Brief *Amicus Curiae* by Colorado Interstate Gas Company). The result in increased litigation in the federal courts is obvious.

Proper construction of Section 22, and adherence to precedents laid down by federal Courts of Appeals, means that disputes over a rate relationship remain in the framework of the Act. However, if Cities' views were sustained, Petitioner, all other producers, and customers would be free to question and change Commission acts and now effective rates in cents-per-Mcf by resorting to ancillary, collateral litigation outside the primary administrative jurisdiction under Section 4, appellate jurisdiction under Section 19, and enforcement provisions of Section 22.

III. THE STATUS BETWEEN JANUARY 1, 1954 AND THE FILING OF THE RATE.

Cities implies that even though the state court may lack jurisdiction to adjudicate the filed rate, it had jurisdiction over the price between the effective date of the Kansas order and the date of filing (Cities Br., p. 33). This contention requires consideration of Cities' claim that the Kansas order was void *ab initio*. (See R. 14-18.)

Cases giving rise to contention that the Kansas order was void *ab initio* begin with *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954), holding independent producers to be "natural-gas companies" under the Act. Next came *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44 (1955), wherein this Court invalidated on Oklahoma minimum price order on the ground that it conflicted with Commission jurisdiction. It was not stated whether the Oklahoma order was void *ab initio* or only after affirmative control of the rates had been assumed by the Commission. Next, in *Cities Service Gas Co.* v. *State Corp. Comm. of Kansas*, 355 U.S. 391 (1958), the *per curiam* opinion of this Court merely reversed the Kansas Supreme Court's holding that the Kansas order was valid. This Court cited *Panoma, supra*, as authority, but nothing was said on the void *ab initio* question. Next, the Kansas Supreme Court construed this Court's *per curiam* decision:

> "... we understand the Supreme Court of the United States to hold that on January 1, 1954, the State of Kansas had no jurisdiction to regulate the price of natural gas as it came out of the gas well since that price would affect interstate commerce and the jurisdiction of the Federal Power Commission." (184 Kan. 540, 544)

Possibly the Kansas order was void *ab initio*, but it appears that this Court may not have so ruled, and the Kansas Supreme Court has only stated what it "understands" to be the effect of this Court's *per curiam* order. (*Cf.* Pet. Main Br., p. 12, fn. 9.)

Either the Kansas order or the Act must have been the legal touchstone determining questions concerning the price of Kansas gas during the period prior to June 7, 1954. If the Kansas order was effective, the plaintiff cannot recover here even under its own allegations, because the Kansas order controlled. If, however, Kansas regulation did not control because the Act did, plaintiff's claims must be based upon that Act, and a state court could not have jurisdiction.

IV. THE COMMISSION EXERCISED ITS PRIMARY JURISDICTION AND DUTY BY ACCEPTING AND MAKING EFFECTIVE THE RATES OF 11 AND 11.0715 CENTS; THE RIGHTS AND LIABILITIES OF THE PARTIES CANNOT BE ENFORCED IN A STATE COURT.

A. Rates on file exclusively determine rights and liabilities of the parties.

Cities labels references to Sections 4 and 19 as merely "merits of a defense," but then argues that the "contract rate" is "the filed rate". (See Cities Br., pp. 35-56). Sections 4 and 19 are pertinent here to statutory finality in the face of assertion of state court jurisdiction. Misconstruction of the binding effect of Commission acts, and of the jurisdiction of the Courts of Appeals, apparently led to acceptance below of Cities' oft-repeated "contract" language as controlling upon source of rights and liabilities enforceable under Section 22. (*Cf.* R. 8, 12-13, 18, 21, 33, 35-37, 278-281, 282-554, 764-767, 768-770).

Cities' argument here is the same belittling of Commission procedures in 1954, 1955, and 1957, and which are still the Commission's only procedures for regulating a producer's rate. Petitioner has shown the effect of Section 4 upon rights and liabilities once a rate *is* accepted and effective (Pet. Main Br., pp. 25-37), and reasons and necessity for according finality to Commission actions (Pet. Main Br., pp. 38-47).

Repeatedly, Cities now states that in accepting Petitioner's rate the "Commission carefully preserved Cities' sub-

stantive rights," *e.g.*, Cities Br., p. 37. The most pivotal point in this controversy relates to the legal effect of the Commission action. If when the filings were tendered the Commission decided to accept 11c as the filed rate rather than to reject it, then right or wrong that determination cannot be attacked collaterally. If the determination was incorrect but was not appealed, that determination has acquired statutory finality and cannot now be changed by any court or by the Commission itself.

In *Mobile* this Court said (350 U.S. at 347):

> "There can be no doubt of the authority of the Commission to reject the unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act,' Sec. 16, and its failure to do so and its order 'permitting' the new rates to become effective were in error."

If it was "error" to so fail to reject an "unauthorized" tender, it follows that the Act imposes on the Commission a duty to determine whether each tendered rate is so "authorized" or "unauthorized." That duty can be performed only by deciding at the time of the tender whether the rate should be accepted for filing, or whether for some legal or other reason, the tender should be rejected. Therefore, the Commission has and exercises this primary jurisdiction to determine whether to accept or reject a tendered rate. The Commission obviously has jurisdiction to "err," and, if "errors" are not corrected on appeal, such decisions become just as binding as a "correct" decision.

This record shows that the Commission accepted and made effective Petitioner's tendered rate. Under the Act, such acceptance rests upon the fact that the decision to accept or reject was resolved by the Commission in favor of acceptance. Cities now says that in accepting rate filings the Commission does not determine anything. If Cities were correct, it must be presumed that the Commission

does not do its duty, but certainly neither the law nor the facts permit such a presumption. Cities' argument that the Commission "did not decide" anything thus collapses in the face of the Commission's statutory duty *and* the fact that Petitioner's rate was accepted and is now legally binding.

B. The Commission applies the Montana-Dakota rule to require collection of the exact cents-per-Mcf rate effective under Section 4.

Any implication that the Commission itself does not apply the *Montana-Dakota* rule in vigorous control of the effective rate level in cents-per-Mcf that producers may charge under the Act, can be quickly laid to rest.

As recently as February 15, 1961, the Commission reiterated that a producer "'can claim no rate as a legal right which is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms'."[*] The Commission further stated that if producers "were not required to collect" the rate made effective through procedures of Section 4, "... serious problems would confront not only pipeline purchasers of natural gas, and, in turn, distribution company purchasers of natural gas, but also the Commission itself in the administration of the Natural Gas Act."

Petitioner's position is wholly consistent with such holdings, and Cities' theories are directly contrary. Cities merely repeats or implies, again and again, that Petitioner and Cities have entered into an alleged written or implied "refund agreement," to change the effective rate collaterally. (Cities Br., pp. 3, 5-6, 7, 9, 12, 16, 18, 20, 24, 35, 36,

[*] Re *Alfred C. Glassell, Jr., et al.*, FPC Docket No. RI60-130, Order of February 15, 1961, page 3, mimeo. ed. As this Order is not yet reported, it is set forth completely as Appendix A to this brief.

35). Petitioner has always been prepared to show that there never has been such a collateral "agreement." (R. 620-634)[7] There can be no automatic "conditional"[5] rate under the Act. (*Cf.* Cities Br., p. 38 and Pet. Main Br., pp. 30-32).

The controlling rate always remains that currently effective under the Act, to which the Commission itself applies the *Montana-Dakota* rule.

C. The effective rate in cents-per-Mcf cannot be changed by "automatic" operation of a contract or collateral "contingencies."

Cities implies that Order No. 174 set up a system wholly apart from the Act and existing Regulations

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[7] Here it suffices to note that:

(a) Cities' Brief now concedes at page 38 that documents tendered by Petitioner in 1954 contained ". . . the only agreement Petitioners had and could file with the Commission . . ."; and Petitioner's filing there discussed does *not* include correspondence or vouchers which Cities later alleged below could constitute "a refund contract" (see R. 285-308, 309-484, 485-491, 496-498);

(b) Cities' own letter of January 21, 1954 refers solely to payments pursuant to a state order, makes no reference to federal rate regulation or payments pursuant to filed rates under the Act, and is but a unilateral announcement of a claim that payments under the old state order were considered by Cities to be "involuntary" (see Cities Br., p. 5);

(c) The "Stanolind letter," if anything, was only a proposition which Cities ignored, and which refers solely to "an adjudication which would be binding and controlling on Stanolind" without reference to the Natural Gas Act;

(d) Initial demands made by Cities in 1958 were on alleged grounds wholly inconsistent with an actual or implied ancillary agreement;

(e) "Involuntary" payment under *a state order*, by Cities, Petitioner or anyone, has nothing to do with payment under *the federal rate* since June 7, 1954 (*cf.* Cities Br., p. 6.)

and Rules, and then that collateral change of the effective rate in cents-per-Mcf is permitted (Cities Br., pp. 8-11, 16-17, 37, 42-49). Each of these arguments or implications is wholly without foundation.

Order No. 174 (19 Fed. Reg. 4534, 8807 (1954)) was but one of many orders issued since 1938 amending the Regulations. Existing Regulations otherwise applicable to producers and Cities as "natural-gas companies," and all provisions of the Rules for protests or complaints remained applicable. (See Pet. Main Br., pp. 27-28). Sections 4, 19, and ultimately Section 22, likewise applied, and do apply, in producer regulation. Cities, like any other person, was required by the Act to comply with these Rules, Regulations, and the Act to make known any of its views in 1954, 1955, and 1957. (*Cf.* Cities Br., pp. 8-11, 16-17, 37, 42-49).

As published in 1954, apprising all affected persons, the Commission thus prescribed Section 154.94(a) of the Regulations:

> "(a) *No change* shall be made *in any rate*, charge, or service *in effect, on or after* June 7, 1954, for the interstate transportation or sale of natural gas in interstate commerce subject to the jurisdiction of the Commission by any independent producer required to file rate schedules pursuant to Section 154.92 hereof, *without first filing a change in rates pursuant to Section 4(d)* of the Natural Gas Act, and in accordance with this Section." (Emphasis supplied.)

The Commission further clearly prescribed in Section 154.94(c):

> "(c) The *operation of any provision* of the rate schedule *providing for failure* or periodic *changes* in *the rate*, charge, classification, or service, after June 7, 1954, *or* the *operation* of *any like provision* in any initial rate schedule filed after June 7, 1954, *shall* constitute a *change* in *rate schedule*." (Emphasis supplied.)*

* Section 154.94 is reproduced in full at pp. 67-69 of Petitioner's Main Brief.

These Regulations remain in full force and effect today. (*Cf.* Cities Br., pp. 39, 40-41, 43, 47, 56).

The Commission thus assumed the primary duty of determining the effective rate in cents-per-Mcf for each sale, upon the basis of the rate tender. The whole purpose of the requirement in Section 154.92 for a "statement showing actual billing" in exact cents-per-Mcf (see R. 496-498); of Commission review of the tender and the Commission's Summary; of formal consideration of the tendered rate in cents-per-Mcf; of specification by the Commission of the effective rate in cents-per-Mcf; and of notice of acceptance for filing after the Commission's formal vote, is to make an exact cents-per-Mcf rate legally effective and binding under the Act and Regulations. All are set forth in public documents and are notice to the public—including Cities—of the contents thereof (see Pet. Main Br., pp. 19, 22-23). Consistent with the Act and Regulations, the Commission's letter orders thus also prohibit any change in the effective rate except by tender of a new rate under Section 4 (R. 640).

There thus can be no type of automatic, collateral increase or decrease of the rate in cents-per-Mcf by means of collateral agreement, collateral "construction" or contingencies, or "enforcement" of a different price by state court judgment. Such a theory has long since been rejected by the federal Courts of Appeals, even when *Mobile* has been invoked.[9]

Cities thus strikes collaterally at the heart of the Commission's system of regulation of producers by exercise of its primary jurisdiction and duties under Section 4. If the

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[9] See *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (5th Cir. 1958), *cert. den.*, 358 U.S. 804 (1958); *Continental Oil Co.* v. *Federal Power Commission*, 236 F. 2d 839 (5th Cir. 1956); *Episcopal Theological Seminary, et al.* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959), *cert. den., sub. nom., Pan American Petroleum Corporation* v. *Federal Power Commission*, 361 U.S. 895 (1959).

rate level can be so collaterally changed here, then each and every other rate effective under the system Cities belittles, is now subject to decrease or increase by state court re-examination of Commission acts. The pertinent point here, however, is that this effective rate level is binding as to rights and liabilities and can neither be changed, nor modified, nor enforced by collateral actions in a state court.

D. Collateral examination of reasons for the federal agency's acts is prohibited.

Cities seeks a collateral "mind-reading" after a federal agency acts, but this is also incompatible with any administrative process. (See *United States* v. *Morgan*, 313 U.S. 409, 422 (1941), and Pet. Main Br., pp. 26, 46, 50).

Cities concedes that the Commission "could and did accept" Petitioner's tender (Cities Br., p. 38); that the Commission "acted on these rate filings" (Cities Br., p. 42); that the Commission "considered and accepted" the tendered filing (Cities Br., p. 47); and that the Commission "voted to accept" Petitioner's tender (Cities Br., p. 47). These actions may not be an "adjudication" or "modification" in a sense Cities implies, but are definitive steps in the administrative process required by the Act, result in inevitable consequences under the Act, and bind and control the rate relationship until the rate level is properly changed.[10]

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[10]It would appear that the Commission prepares its Summaries for use in its formal meetings to pinpoint the "cents-per-Mcf" rate for its expeditious review of the tendered rate (*Cf.* Cities Br., p. 47). Many such Commission determinations under Section 4, controlling the effective rate level in cents-per-Mcf, have been reviewed exclusively under Section 19(b), *e.g.*, 10.1829 cents or 9.8262 cents in *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (10th Cir. 1956); 13 or 13.5 cents in *Episcopal Theological Seminary, et al.* v. *Federal Power Commission*, 269 F. 2d 228 (D.C. Cir. 1959); 8.374 cents or 8.4684 cents in *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (10th

Brief, specific reference may be made to procedures Cities assails (Cities Br., pp. 35-57):

1. *Petitioner's rate tenders.* Petitioner's rate tenders were submitted subject to the prohibition of automatic fluctuation in rate, *supra*, once the Commission accepted and made effective a given rate. (See Pet. Main Br., pp. 30-32, and R. 703-725). Neither Petitioner nor apparently the Commission was then apprised that Cities privately believed some ancillary refund "agreement" existed or was implied to exist. The record shows results of Commission review, and the effective rates of 11 and 11.0715 cents under Section 4, subject to Sections 154.94(a) and (c) of the Regulations. These rates are no more "conditional" or subject to "automatic" or "contingent" fluctuation by private agreement or through collateral proceedings than are any of thousands of other rates now so effective under Section 4.

2. *Opportunities available to Cities.* The record shows service upon Cities in 1954 and 1957 (R. 758-759, 648). At no time did Cities then make known its private notions that the Act and Regulations permit a "contingently" effective rate, its theory as to a "refund contract," or even status of its efforts, if any, to contest validity of a state order in collateral proceedings to which neither Petitioner nor the Commission were parties. Yet Cities was on notice as to the tenders, the Rules for protest or complaint, Regulations, the Act, and all administrative and judicial constructions thereof.

3. *The Commission's letter orders.* Cities continues efforts to discredit Commission letter orders but the Commission itself has told the courts these are binding orders as to time and rate level. (See, *e.g., Continental Oil*

Cir. 1955); 11 cents or 16.8 cents in *Warren Petroleum Corp.* v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960); and 6 cents or 11 cents in *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958).

Co. v. *Federal Power Commission*, 236 F. 2d 839, fn. 3, 841, 842 (5th Cir. 1956).) Cities, nevertheless, asserts that a reservation of "approval" as to "reasonableness" means the accepted and effective rate may be collaterally changed. (*Cf.* Cities Br., pp. 45-46, and Pet. Main Br., p. 34, fn. 18). However, the identical reservation of "approval" appears in the order "accepting" an 11 cents tender held to be binding, final and reviewable, as Cities itself argued, in *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (10th Cir. 1958).[11] Cities also fails to note that the identical reservation of "approval" is used in orders "accepting" and making effective Cities' own rates,[12] but Cities and its customers emphasize here that Cities' own rate relationship is exclusively controlled by Commission orders. Obviously, precise format of such letter orders is not significant, and may change from time to time; what is significant is the legal effect of such orders and Commission acts under Section 4 in controlling rights and liabilities. Reservation of "approval" has never meant collateral change is authorized. See *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771, 773 (3rd Cir. 1956).

4. *Petitioner's certificate in Docket No. G-4904.* Cities also implies that a certificate issued under Section 7 some-

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[11] I.e., ". . . nor shall it be construed as constituting approval by the Commission of any service, rate, charge, classification, or any rule, regulation, or practice affecting such service or rate provided for in the above-described rate schedule, nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate. . . ." (R. 681, 693, 694, 697-698).

[12] I.e., ". . . nor shall this order be construed as constituting approval by this Commission of any service, rate, charge, or classification, or any rule, regulation, or practice affecting them; nor shall this order be deemed as recognition of any claimed contractual right or obligation affecting or relating to any service, rate, charge, or classification." Unreported Commission order of April 3, 1959 accepting for filing and allowing a Cities Service Gas Company rate to go into effect, reproduced in its entirety as Appendix B, *infra*.

how obliterated controlling actions in 1955 and 1957 under Section 4, accepting and making effective tendered rates (Cities Br., p. 49; Pet. Main Br., p. 9, fn. 7). The face of the order reflects early stipulation of all parties—*including Cities* and Commission Staff—that that docket was not a proper forum for this controversy (Cities Br., p. 3a). The certificate order simply shows Commission agreement that a Section 7 proceeding is not appropriate for determining binding effect of past actions under Section 4, collateral review, or "enforcement" of rights as under Section 22.[13] The Commission recognized that a rate of 11 cents is fully in accord with the Section 7 standard of public convenience and necessity, but the 1954 and 1957 acts under Section 4 were correctly left untouched, and the Commission did not presume to exercise jurisdiction of the Courts of Appeals under Section 19, or the federal District Courts—including that of Kansas—under Section 22.

Correctness of such action is shown by the order in Appendix E, Cities Br., pp. 21a-27a. That "settlement order" between Magnolia Petroleum Company (now Socony-Mobil Oil Company, Inc.) and Cities sets forth the step-by-step conditions precedent to the type of relief Cities now seeks in a state court. The Commission refers specifically to review under Section 19(b) "of Commission acceptance" of a tendered rate under Section 4 (255 F. 2d 850); to Commission compliance with "a mandate from the court"; and lastly, to suit by Cities in the United States District Court for the District of Kansas (Cities Br., pp. 21a and 22a).

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[13] Cities erroneously implies that the Commission's reference to "Kansas courts" for ultimate resolution of the dispute means "state courts." (Cities Br., p. 50). The record before the Commission in Docket No. G-4904 closed on November 6, 1958 (Cities Br., pp. 2a-8a). At that time and until December 31, 1958, action in Kansas was pending in the United States District Court for the District of Kansas, to which it had been removed by Cities. (See *Pan American Petroleum Corporation* v. *Cities Service Gas Co.*, 182 F. Supp. 439 (D. Kans. 1958).)

Thus, in no sense did the Section 7 order in Docket No. G-4904 change the rate on file since 1954, nor does it bless state court jurisdiction over that rate.

5. *Commission consideration of validity of Kansas Order.* Cities' speculation now as to what "might-have-been" is irrelevant and improper, but Cities is wholly in error in its statement that in 1954 or 1955 the Commission "had no choice but to accept" a tendered 11 cent rate. The then sitting Commissioners *may* not have ascribed validity to the 11 cents rate *had* Cities *then* stated its private views as to acceptance and effectiveness of 11 cents as the federal rate. Compare Cities Brief, pp. 51-52 and fn. 40; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 160-166 (1946); and *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

In exercise of paramount jurisdiction over the rate and by accepting the 11 cents rate under the Act, the then sitting Commissioners apparently recognized the 11 cent rate level as desirable and required for conservation and control of inferior uses of natural gas, consistent with the Commission's functions under the Act. However, *had* Cities made known its contentions, the then sitting Commissioners *might* have rejected a tendered rate as has been done on other occasions; *or*, the Commissioners might have deferred "acceptance for filing," pending consideration of Cities' contentions.

The fact remains that no one was apprised of views Cities began asserting *only* in January, 1958, and now sets forth in state courts and here.[14] The fact also remains that the

[14] As stated in its Answer (R. 620), Petitioner has always been prepared to demonstrate, in a proper forum, that instead of contesting the validity of the 11¢ rates, Cities was actually supporting validity of producers' filed rates of 11¢ per Mcf. *Cf.* questions remanded in *Portsmouth Gas Co.* v. *Federal Power Commission*, 247 F. 2d 90 (D.C. Cir. 1957).

Commission's acceptance of 11¢ as the federal rate was without condition, and definitively established the effective rate in cents-per-Mcf under the Act. What "might" have happened had Cities proceeded in a timely manner can only be the subject of speculation now—not a basis for state court jurisdiction.

E. The Magnolia Petroleum Company (now Socony-Mobil Oil Company, Inc.) case illustrates Cities' failure to exhaust administrative remedies and pursue statutory procedures.

Apparently to obscure relevance to jurisdiction, Cities refers only to substantive issues in the "Magnolia Petroleum Company" and "Dorchester Corporation" cases (Cities Br., pp. 52-57). The contrast with collateral attack in state courts still shows through (see Pet. Main Br., pp. 35-36, 42-43, and 43-45).

The legal effect of Commission action in *Magnolia* is identical to legal effect of its action here. In both instances it "accepted for filing" rate schedules specifically including the Kansas order. In both instances it said (a) that any change in *the* rate being accepted would constitute a change in rate which could not be effectuated *without* filing notice under Section 4(d), even though documents might provide such change could be "automatic"; (b) that "acceptance" did not constitute "approval" of any rate; (c) that its action should not be construed as a waiver of requirements of Section 7; (d) that its action should not be deemed as recognition of any claimed "contractual right" or "obligation" relating to the rate; and (e) that such "acceptance" was without prejudice to whatever action the Commission might take in future proceedings involving that producer. Even the language used by the Commission is practically verbatim. (*Cf.* R. 659-667, 670-677, 680, 683, 684-692, 693, 697, 700-703).

Agreeing fully with Cities' own contentions, the Court of Appeals held that any rights of Cities to redeem pay-

ments would be foreclosed by an outstanding Commission order of acceptance of the tendered rate of 11¢ as the legal rate under Section 4, and that Cities was correct in timely protest and judicial review under Section 19(b). (*Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860, 862, 863 (10th Cir. 1958).[15]

Cities cannot obscure the fact that the legal effect of the Commission's actions in *Magnolia* and here is identical. Being "aggrieved" there, Cities was so "aggrieved" here. It pursued its administrative remedies there, but did not here. There is no excuse for that failure and collateral proceedings here.

Cities' efforts to distinguish the necessity for proceeding under the Act in one instance, and not in another, have but one recurrent theme—a recital of what was in Cities' own private mind and changes of its own thoughts from 1954 through 1958, never made known to the Commission or to Petitioner (Cities Br., pp. 52-53). Yet this silence is particularly pertinent when the face of the 1954 Regulations and developing precedent in producer regulation were and are directly contrary to these thoughts Cities now asserts.

Cities thus refers to private thoughts that Petitioner had "agreed" to a prohibited "retroactive refund" or "automatic" rate change *after* June 7, 1954 (Cities Br., pp. 54-55); yet, Cities' idea came as a surprise in 1958, and, of course, was never communicated by Cities to the Commission during the four preceding years. Cities also, seems to be saying that a "decision" in "the *Panoma* case" somehow caused change in these private thoughts, and only thereafter did it pursue administrative remedies

[15] Finality of such orders and reviewability is also illustrated by *Continental Oil Co.* v. *Federal Power Commission*, 236 F. 2d 839 (5th Cir. 1956), and *Warren Petroleum Corp.* v. *Federal Power Commission*, 282 F. 2d 312 (10th Cir. 1960).

(Cities Br., p. 53).[16] There had been "a decision" in the "*Panoma* case" when Petitioner tendered its change of rate from 11¢ to 11.0715¢, yet Cities still remained silent on July 1, 1957 (R. 651, 653, 654-655).

The questions of significance here are how the Commission was to follow or act on all of these shifts in Cities' private thoughts, and how it or anyone else was supposed to guess in 1954, 1955, or 1957 just when Cities thought the Kansas order was valid, or when Cities did not; or just when Cities thought the Commission might have erred in accepting and making effective 11¢ as the effective rate *under the Act*, or when Cities thought otherwise.

It is clearly unlawful for agency and statutory procedures to be bypassed and overturned on the basis of such afterthoughts four years later. Cities simply did not pursue its remedies in timely manner and asks this Court to approve its use of state courts as a belated substitute for appellate review under Section 19(b).

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[16] Cities' afterthoughts become even more mysterious when the cases are considered. On January 20, 1958, this Court reversed the Kansas Court as to validity of the *Kansas* wellhead pricing order. (*Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, 355 U.S. 391 (1958). Yet, it was not until seven day *later*, on January 27, 1958, that this Court reversed the Oklahoma Supreme Court, invalidating the *Oklahoma* order involved in "Panoma" *insofar as it also applied to wellhead sales*. *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma*, 355 U.S. 425 (1958). Cities' statement that "a decision" in "the *Panoma* case" convinced Cities to begin pursuing its administrative remedies with respect to an 11¢ rate for *Kansas* sales only on February 5, 1957, thus bears little relationship to what actually took place in rulings on the Oklahoma and Kansas Orders—although this might have been the process of Cities' private thoughts.

V. CITIES HAS MADE CLEAR THAT IT SIMPLY SEEKS TO BYPASS THE CONTROLLING PROCEDURES OF THE ACT.

Lastly, Cities refers to a "refund condition" specified in Cities' rate case in Docket No. G-2410 (Cities Br., pp. 6, 57-58). Petitioner's rate was not there in issue.[17] Petitioner is not named in that order, nor has it ever been one of the unnamed "companies involved in cases questioning the so-called Kansas Minimum Price Order." (See R. 559-560, 564, 566, 571). In that order, the Commission made no attempt to specify procedures as to rates of suppliers to Cities which are subject to Section 4. As illustrated by Cities' Appendix E, conditions precedent to any act by Cities under the order in Docket No. G-2410 required pursuit by Cities of exclusive administrative and statutory processes.

Cities' customers also must be aware of Cities' actions which long ago indicated acquiescence in validity of federal rates of suppliers who are "natural-gas companies" and who filed under the Act in 1954 and 1955. Cities and its customers thus have had the benefit of substantial investment by producers and the increased supplies made possible by the very reasonable conclusion that the rate of 11 cents under the Act was stable and unquestioned. These are matters which Petitioner has always been prepared to show in a proper forum (R. 627-631, 632-634).[18] More pertinent

[17] For example, the Commission by Order issued February 9, 1961, in Cities Service Gas Company, *et al*, Docket Nos. G-18799, *et al*, held that only pipeline customers and consumers of gas sold by pipeline companies have an interest in pipeline company rate proceedings and that independent producers do not have an interest in such proceedings. (See Cities Br., pp. 19a-20a.)

[18] In its recent Statement of Policy No. 61-1, the Commission, considering consumer protection and adequacy of gas supply, recognized as necessary and acceptable to it, and required by those objectives, a rate of 16 cents per Mcf for new sales in the State of Kansas, and a rate of at least 11 cents for existing sales (See 25 Fed. Reg. 9578-9579 (Oct. 5, 1961).)

here are questions of rate stability through Commission control, without which a regulatory system cannot function.

Cities recognizes that "jurisdiction" does not turn upon the "result reached," but upon the "power" of a body to act. (Cities Br., p. 14). This is precisely why primary jurisdiction over the rate is vested in the Commission, why statutory finality is accorded to Commission acts, and why those acts may not be attacked collaterally. (See Pet. Main Br., pp. 25-32). For reasons obviously considered proper to the then members of the Commission, the 11 cents base rate was accepted for filing and *is* effective under the Act. Cities' attack here is colored by reference to a state pricing order, but the procedures in question relate to a host of other disputes involving interpretation of schedules and collateral re-examination of Commission acts under Section 4.

Cities' position is equivalent to that of the bondholders in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). In a prior case, acting under a federal statute, a court had issued an order that bondholders had to file their claims by a certain date or the claims would thereafter be barred. The bondholders raised no question as to this order. Subsequently, and in a different proceeding, the statute under which that court had acted was held to be unconstitutional. Thereafter the bondholders brought suit upon their bonds, but this Court held that the previous court order rendered this subject final and binding as to these bondholders, and that the fact of unconstitutionality of the statute could not be used to reach backward and reopen an action which had become final. Here, if Cities desired to interpose a claim that a state order was invalid or that 11 cents should not have been accepted and effective under the federal Act, Cities should have done so. It cannot now reach backwards and employ a decree from a totally unrelated proceeding on a state order to destroy federal acts which have become final. Cities is hardly in a

position to claim that the administrative and statutory procedures were inadequate to protect its position when it did not use the procedures available (See *Yakus* v. *United States*, 321 U.S. 414 (1944); *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117 (1926).)

Throughout this particular attack, Petitioner's position has been (1) that under the Act, the effective rate cannot be subjected to collateral attack and retroactive revision, but is binding until the rate level is changed under Sections 4 or 5; (2) that once the subject matter in dispute is so recognized, rights and liabilities can be enforced only under Section 22; (3) that *if* it could now be proper to go behind the filed rate and re-examine a "source" in "state law," Cities' allegations are without foundation, and under Kansas law, the relationship has been modified so that a rate of 11¢ is still binding; and (4) that *if* germane in any forum, the rate level of 11¢ is consistent with tests of consumer protection, adequacy of gas supply, and is not in any way "unreasonable" but is below current compensatory rate levels.

As the case has now reached this Court, Cities' purposes are clear. The subject matter has been revealed; and results of intrusion of a state court into the regulatory process have been classically demonstrated.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Main Brief, it is respectfully submitted that the judgment of the Supreme Court of the State of Delaware

should be reversed and vacated, and that thereupon a Writ of Prohibition prayed for in that court by Petitioner should issue.

Respectfully submitted,

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